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Edward J. Devitt

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WHY DON'T LAW SCHOOLS TEACH LAW STUDENTS HOW TO TRY LAW SUITS?*

Remarks of

The Honorable Edward J. Devitt**

I. INTRODUCTION

THERE IS A PROBLEM OF INADEQUATE TRIAL ADVOCACY in the courts of this country, although the problem exists in only a minority of the trial bar. The principal reason for the problem is deficient training—too many lawyers simply do not know how to try a lawsuit. Both the blame and the solution lie primarily with the law schools, which have, as a result of an historical accident, developed a strong bias against “skills training.” To solve this problem the bench and bar, particularly the American Bar Association, must assume far greater responsibility in providing the necessary incentives to encourage development of quality skills training programs in the law schools of this country.

My views on the quality of trial advocacy flow from my experiences as a federal trial judge for more than a quarter of a century and as chairman of the Committee to Consider Standards for Admission to Practice in the Federal Courts (Devitt Committee).¹ I have observed

* This text provided the basis for remarks to the Palm Beach Bar Association on March 10, 1980.

** Chief Judge, United States District Court for the District of Minnesota. B.A., LL.B., University of North Dakota.

¹ The Judicial Conference of the United States authorized the formation of a committee in September, 1975. Chief Justice Burger appointed the members shortly thereafter and designated the author as chair. Although commonly referred to as the Devitt Committee, this is to some extent a misnomer because the author has dissented to some of the more significant recommendations of that committee. See *FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES* 12, 15 (Sept. 19-20, 1979), reprinted in 83 F.R.D. 215, 224-25 (1979) [hereinafter cited as *FINAL REPORT*].

The Devitt Committee consisted of twenty-four members, representing an impressive cross-section of the legal community, including nine federal trial judges, three federal appellate judges, six law school deans, six prominent practicing attorneys, and four law school consultants. They are:

Hon. Edward J. Devitt,	Dean E. Gordon Gee
Chairman	Dean Joseph R. Julin
Hon. Sherman G. Finesilver	Dean Joseph McLaughlin
Hon. A. Leon Higginbotham	Dean Dorothy W. Nelson
Hon. Robert E. Keeton	Dean E. Donald Shapiro
Hon. James Lawrence King	

hundreds of trial lawyers in action, the large majority of whom were quite good. A significant number, however, were less than adequate. If lawsuits were no more than a game, with the more skillful participant emerging the victor, the great diversity of skills among trial lawyers would not be so troubling. Unfortunately, lawsuits are not a game; people's fortunes and sometimes their liberty are at stake. When a litigant's fortune or liberty is lost as the result of poor representation by counsel, an injustice has been done. Such injustice cannot be ignored by a bench and bar committed to the ideal of a fair and effective judicial system.

The Devitt Committee studied the quality of advocacy in the federal courts for three years, held hearings to determine how best to resolve problems in the realm of courtroom advocacy, and made recommendations to the Judicial Conference.² In addition, the Federal Judicial Center conducted research and surveys for the Devitt Committee to document the quality of trial advocacy in the federal courts.³

As chairman of the Devitt Committee I was exposed to a wide range of views concerning the issue of the quality of trial advocacy in this country's courts. That experience made apparent the seriousness of the problem of inadequate trial advocacy and the necessity for appropriate remedies. The cure for this lies primarily with the law schools. What is needed is a fundamental change in attitude among American law schools. This commentary will establish that these pragmatic views have the support of logic, history and the available hard evidence.

Hon. James E. Lasker

Hon. James R. Miller, Jr.

Hon. Charles B. Renfrew

Hon. Adrian A. Spears

Hon. Robert L. Taylor

Hon. J. Clifford Wallace

Hon. Malcolm R. Wilkey

Hon. Hubert L. Will

Robert L. Clare, Jr., Esq.

Thomas E. Deacy, Jr., Esq.

Henry Halladay, Esq.

R. William Ide, III, Esq.

William T. Kirby, Esq.

Robert W. Meserve, Esq.

Student Consultants:

Steven C. Charen

Andrew J. Goodman

Michael R. Hollis

David C. Stoup

Staff:

Professor John E. Kennedy,

Reporter

Carl H. Imlay,

General Counsel

Cathy A. Catterson,

Secretariate

² See FINAL REPORT, *supra* note 1; REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO CONSIDER STANDARD FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 21-22, 1978), *reprinted in* 79 F.R.D. 187 (1978) [hereinafter cited as TENTATIVE RECOMMENDATIONS].

³ See G. BERMANT & A. PARTRIDGE, THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS (Aug. 1978) [hereinafter cited as F.J.C. STUDY]. This study can be obtained from the Information Service, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

II. IS THERE A PROBLEM?

A committee of the Association of American Law Schools, chaired by the great legal scholar and educator, Karl Llewellyn, once made the point that law school curricula ought to be based on the "hard facts" as to the needs of the students.⁴ These hard facts have been difficult to ascertain, thus allowing law school professors to follow their personal preferences as to course offerings.⁵ The research conducted by the Devitt Committee and the Federal Judicial Center has, however, supplied some of the needed facts.

The Federal Judicial Center, at the request of the Devitt Committee, conducted an extensive statistical survey.⁶ The Judicial Center surveyed 387 federal district judges, who were asked to rate the performances of attorneys in actual trials. A total of 1,969 lawyers were rated. Of those, 8.6% were rated "very poor," "poor," and "not quite adequate," while another 16.7% were rated "adequate but no better."⁷ The judges believed that the direct result of lawyer inadequacy was that a client's interests were not fully protected.⁸ The opinions of a sample of experienced trial lawyers mirrored those of the judges surveyed.⁹

While the Federal Judicial Center was conducting its statistical research, the Devitt Committee gathered written statements concerning the quality of trial advocacy. Typical of the comments received is one from Chief Judge Joseph S. Lord of Pennsylvania: "I have long been a believer that the law schools are turning out the equivalent of doctors who know location of muscles, nerves, etc. from textbooks, but who haven't the slightest practical feeling for treating any of them."¹⁰

Based on the Federal Judicial Center study and its own hearings and research, the Devitt Committee concluded that there was a serious problem with the adequacy of trial attorneys practicing in the federal courts.¹¹ The problem was traced to the advocates' lack of knowledge on

⁴ Committee on Curriculum of the Association of American Law Schools, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 346 (1945) [hereinafter cited as Llewellyn Report].

⁵ See, e.g., Pincus, *Clinical Training in the Law School: A Challenge and a Primer for the Bar and Admission Authorities*, 50 ST. JOHN'S L. REV. 479 (1976). "In the prestige law schools law professors also like to teach subjects similar to subjects taught in other disciplines. This makes a law professor respectable and understandable in the eyes of other university teachers." *Id.* at 487.

⁶ See F.J.C. STUDY, *supra* note 3.

⁷ *Id.* at 13, Table 1.

⁸ *Id.* at 17-19, Table 4.

⁹ *Id.* at 16-19, Table 5.

¹⁰ See also Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973). Chief Judge Bazelon repeats a trial judge's observation that many lawyers coming to court are "walking violations of the Sixth Amendment." *Id.* at 2.

¹¹ See TENTATIVE RECOMMENDATIONS, *supra* note 2, 79 F.R.D. at 195.

how to plan and try a lawsuit.¹² Thus, the Devitt Committee verified what many observers¹³ have long thought to be true: Lawyers are not being adequately trained to try lawsuits, neither in law school nor following graduation.

III. THE ROLE OF THE LAW SCHOOLS

A. *Development of Legal Education in this Country*

Why have law schools not effectively tackled the problem of training their students to be quality trial advocates? The answers can be found at least in part in history. Without attempting to present a detailed history of American legal education the following overview offers an understanding of the development of legal education in this country.¹⁴ This understanding is essential to explain present attitudes within the law school community.

Throughout most of the 1800's the legal profession was not highly regarded in this country, probably for good reason. Law schools were virtually nonexistent and most lawyers received their training by "reading the law" under the guidance of an established attorney or by studying law books and statutes on their own. Abraham Lincoln, for example, became a lawyer simply by borrowing the few available legal texts and studying them.¹⁵ Furthermore, the law schools that did exist, such as Harvard, accepted applicants without attempting to screen them for intelligence or other relevant factors.¹⁶ This rather haphazard training was reflective of the times: America in the 1800's had a strong Jeffersonian bent for the common man and believed that any person should be allowed to enter the profession of his choosing, regardless of qualifications.¹⁷ This egalitarian attitude, however, resulted in a legal profession in which lawyers with marginal abilities were common and in all likelihood, predominated.

The year 1870 marks a turning point in the education of American lawyers. In that year Christopher Columbus Langdell was named dean

¹² *Id.* at 194. See F.J.C. STUDY, *supra* note 3, at 45-48, Tables 27, 28.

¹³ See, e.g., Burger, *The Special Skills of Advocacy*, 42 *FORDHAM L. REV.* 227 (1973); Frank, *A Plea for Lawyer-Schools*, 56 *YALE L.J.* 1303 (1947); Kaufman, *The Court Needs a Friend in Court*, 60 *A.B.A.J.* 175 (1974); Llewellyn, *Oh What Is Wrong With So-Called Legal Education*, 35 *COLUM. L. REV.* 651 (1935).

¹⁴ For a more detailed history of legal education in this country, see A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965); Devitt, *The Search for Improved Advocacy in the Federal Courts*, 13 *GONZAGA L. REV.* 897 (1978); Grossman, *Clinical Legal Education: History and Diagnosis*, 26 *J. LEGAL EDUC.* 162 (1974).

¹⁵ See A. WOLDMAN, *LAWYER LINCOLN* 153-54 (1936).

¹⁶ See A. SUTHERLAND, *THE LAW AT HARVARD* 167-68 (1967).

¹⁷ See, e.g., Devitt, *supra* note 14, at 906-07.

of Harvard Law School. During his tenure Langdell instituted fundamental changes in the education of lawyers. His approach, which is presently followed by virtually every law school, had the effect of establishing legal education as a highly intellectual and academic pursuit.¹⁸ This in turn lifted the status of lawyers from one of low repute to one of true professionalism.

Langdell was a bookish and scholarly man¹⁹ who had a driving ambition to elevate the standing of law schools, particularly Harvard, to the same level of academic prestige enjoyed by other graduate schools. He viewed the law as a science and believed "that all the available materials of that science are contained in printed books."²⁰ Langdell developed the "case method" of law school teaching to implement his views. The case method is designed to find the law through analysis of cases. It is normally combined with a Socratic teaching style, the end objective being to refine the analytical and intellectual skills of the student. Langdell thus sought to elevate intellectualism in legal training while sublimating more "practical" aspects of legal education, particularly skills training. For example, he believed law school professors need not have practical legal backgrounds, but rather law schools should "breed professors of law by the same gradual process by which competent teachers are trained in other departments of the University."²¹

Langdell's views have had a most fundamental, and generally positive, effect on the legal profession. By increasing the emphasis on intellectual ability and disciplined mental training, a significantly higher caliber of attorney emerged, and the profession gradually gained the esteem and respect of the public. Moreover, these higher caliber attorneys assumed a greater responsibility for organizing the profession and, as a result, bar associations became more commonplace and law school education replaced the practice of "reading the law" as the predominate source of legal training.

With these positive influences, however, came some significant negative side-effects, many of which still haunt the profession today. The most significant of these is that with the increase in emphasis on intel-

¹⁸ See generally A. SUTHERLAND, *supra* note 16, at 162-205.

¹⁹ Langdell has been described in less complimentary terms. See Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947). "American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell. I call him a neurotic advisedly. He was a cloistered, bookish man, and bookish, too, in a narrow sense." *Id.* at 1303.

²⁰ A. SUTHERLAND, *supra* note 16, at 175 (quoting a speech by Langdell).

²¹ *Id.* at 184.

²² See, e.g., Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 649 (1968); Grossman, *supra* note 14, at 163-64.

lectualism came a corresponding decrease in emphasis on skills training. It became fashionable, and still is in law school circles, to view emphasis on skills training as a sign of law school poverty.

This negative attitude toward skills training is primarily the result of social pressures within the law school community that are unrelated to the question of how best to train law students to be lawyers. Langdell's desire to place the law school on par with other academic graduate schools, and the fact that many law schools were affiliated with universities, caused law schools and their professors to emphasize the academic approach in order to increase their prestige within the academic community. Consequently, because skills training was considered inappropriate for a dignified graduate school, law schools abandoned skills training.²² This historical explanation is sound since it cannot fairly be argued that skills training was shunned because it was irrelevant to becoming a good lawyer.

A related negative side-effect was the predominance of professors with a lack of practical experience. Again, because of a desire to make the law school a respectable graduate institution, it was thought best to hire professors without experience, for "[i]f it be granted that law is to be taught as a science and in the scientific spirit, previous experience in practice becomes as unnecessary as is continuance in practice after teaching begins."²³ The natural consequence of this was that law students were taught by people who had never tested their own abilities in the real world and who could not provide their students with meaningful insights into that world.²⁴ A somewhat more subtle consequence was that law professors developed a prejudice against professors with a skills training orientation, which further impeded the development of skills training in the law schools and discouraged outstanding practitioners from entering the teaching ranks.

It appears that while the Langdell approach has served an essential purpose of upgrading legal education, it has caused the pendulum to swing too far towards academic and abstract legal training. It has created an elitist view toward legal education that, ironically, has resulted in an almost irrational reaction in many law school circles toward the suggestion that skills training merits more emphasis in the law school curriculum.²⁵ It is clear that at least part of the reaction

²³ HARVARD LAW SCHOOL ASSOCIATION, CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 72 (1918).

²⁴ See, e.g., Llewellyn Report, *supra* note 4, at 365.

²⁵ A good example of the irrational reaction is found in a student article in the Columbia Law Review, where the writer urges that law schools should continue their emphasis on analysis training, which is more within their competence "than the knowledge of where to file what in order to perfect a lien." Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710, 721 (1964). The equating of skills training with "how to find the courthouse," of course, avoids the entire

against skills training is the result of a narrow historical elitism, not just a concern over how best to educate a person to be a competent lawyer.

B. *The Law School's Responsibility*

The negative repercussions that resulted from "Langdell's disease"²⁶ can still be observed in law schools. William Pincus captured the problem well:

Under the existing rules of the game it is obviously more important to the law faculty to be linked with the rest of the university than to be connected with the requirements of the profession. Therefore, what is important for law professors is not necessarily important for the law student intent on getting a license entitling him to practice on the public.²⁷

Changes are occurring in the approach of law schools to clinical legal education. Although not too many years ago clinical legal education and skills training were virtually non-existent in most law schools, in the early 1960's a trend toward skills training could be perceived.²⁸ The trend accelerated in the 1970's as a result of the work of such organizations as the Ford Foundation-funded Council on Legal Education for Professional Responsibility (CLEPR).²⁹ In the latter half of the 1970's the issue of lawyer competency was much debated and groups such as the Clare Committee³⁰ and the Devitt Committee brought into sharper focus the need for skills training.

The law schools, often reluctantly, are beginning to respond. Clinical and skills training programs are becoming commonplace and more students are able to participate in these programs.³¹ There is still a signifi-

issue in a most irrational and intellectually dishonest manner. After a few short days in the practice of law, the young lawyer will learn where the courthouse is located, and his clients will be none the worse for it. But how is he to learn to be an effective trial advocate, negotiator, or counselor?

²⁶ Devitt, *Law School Training: Key to Quality Trial Advocacy*, 65 A.B.A.J. 1800, 1802 (1979).

²⁷ Pincus, *Clinical Training in the Law School: A Challenge and a Primer for the Bar and Admissions Authorities*, *supra* note 5, at 487-88.

²⁸ See generally Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L. REV. 695, 755-61.

²⁹ For a detailed explanation of CLEPR's work, see COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, FIFTH BIENNIAL REPORT, 1977-1978, at 19-43 (1979).

³⁰ See *Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 F.R.D. 159 (1975).

³¹ Compare, e.g., Auerbach, *The Education of the Trial Lawyer: What Should the Law Schools Do?*, 34 BENCH AND BAR OF MINN. 19 (1978) (University of Minnesota at that time could only provide trial skills training for one-third of the

cant need for more and better clinical and skills training courses, and law schools are no longer arguing strenuously that such courses do not belong in law schools.³²

It would be a mistake to suppose, however, that law schools have decided to welcome the clinical and skills training programs with open arms. It became obvious to me during my tenure as chairman of the Devitt Committee that clinical and skills training instructors are virtually outcasts in most law schools. They are not paid as well, work longer hours, are less likely to be given tenure, and their work environment is second rate.³³ Most important, they are viewed by their academic counterparts as less than true educators.

The effects of this social dynamic within the law school community should not be underestimated. It discourages many qualified lawyers from entering the teaching ranks as clinical instructors, making the development of quality clinical and skills training programs more difficult. It also causes clinical instructors to accept the first opportunity to move from clinical positions "up" to positions as academic instructors. Most important, it evidences an attitude, subtle but still prevalent, that indicates clinical and skills training programs are a low priority in most law schools. Such an attitude, of course, is a major threat to widespread development and acceptance of quality clinical and skills training programs.

Thus, the major threat to future development of quality skills training programs is an elitist bias within the law school community against such programs. This attitude is understandable in light of the history outlined earlier, but it cannot be condoned. The law schools must learn to accept the need for polished skills training and clinical programs and take the steps necessary to ensure the success of those programs. They must strive to eliminate the indicia of inferiority presently so common in the treatment of clinical professors. They must, in short, give their clinical and skills training programs the priority those programs deserve and need. To do so certainly is in the best interests of the profession and the public. It also is in the best interests of law schools. It is becoming increasingly clear that the profession's dissatisfaction with

students desiring such training) *with, e.g.,* Martin, *Devitt Group Calls for Better Trial Training*, 6 U. MINN. L. SCHOOL Q. 3 (1980) (University of Minnesota law school now is able to provide trial skills training to most of its students).

³² That was the party line for many years. Law schools argued that their students should learn lawyering skills from their employers following graduation from law school. This argument holds some weight with respect to law school graduates who go to work for large firms or the government, where they can receive substantial training under the tutelage of experienced attorneys. But in fact only about one in four graduates goes to work for a large firm or the government. *See, e.g.,* Gee and Jackson, *supra* note 28, at 707 n.6.

³³ *See, e.g.,* Oliphant, *When Will Clinicians Be Allowed to Join the Club?*, 3 LEARNING & L. 34 (1976).

law school education may result in severe restrictions being placed on the law school curricula if the law schools do not meet the needs of the profession. Indicative of this trend is the Indiana Supreme Court's Rule 13,³⁴ which has the effect of prescribing two-thirds of the law school curriculum.³⁵ I do not favor the hand-tying of legal educators to the degree advocated by Indiana's Rule 13, but the development in Indiana, and similar developments in South Carolina and elsewhere, ought to be a warning to law schools that they should take the initiative more convincingly if they hope to retain their academic freedom.

IV. THE PROFESSION'S ROLE

Having maligned the law schools mercilessly, but fairly, the responsibility of the bench and bar must now be examined. It is clear that they have faltered in fulfilling their responsibilities to the public. Too many attorneys have been allowed to enter the profession and represent clients without yet having the training to do the job competently.³⁶ The bench and bar have refused for too long to question the wisdom of the educators in our law schools, who have clung tenaciously to Langdell's revered case method of education and anti-skills training orientation.³⁷

The trend is changing within the profession, as it is within the law schools. The American Bar Association has come out strongly in favor of increased clinical and skill training in the law schools.³⁸ The Judicial Conference of the United States, in response to a recommendation by the Devitt Committee, has urged the ABA to amend its law school accreditation standards to require that all ABA-accredited schools pro-

³⁴ The rule requires students to take courses in the following areas: Administrative Law, Business Organizations, Civil Procedure, Commercial Law, Contracts, Constitutional Law, Criminal Law, Criminal Procedure, Equity, Evidence, Legal Ethics, Legal Research and Writing, Property, Taxation and Torts. IND. S.C. R. 13 (V)(C).

³⁵ See, e.g., Boshkoff, *Indiana's Rule 13, The Killy-Loo Bird of the Legal World*, 3 LEARNING & L. 18 (1976).

³⁶ Consider the following argument:

There can be little doubt but that most graduating law school seniors are incompetent to practice law the day they receive their diploma.

If you are a skeptic, ask a law professor to list the new graduates he would hire to handle a serious criminal charge, properly plan an estate or provide advice in a securities area involving him or his family. If you prefer to conduct a competency poll away from a law school, survey members of the practicing bar.

Oliphant, *supra* note 33, at 35.

³⁷ See, e.g., Pincus, *supra* note 27, at 485.

³⁸ See REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS, A.B.A. Section on Legal Education and Admissions to the Bar (1979) (Crampton Report).

vide quality trial skills courses for their students. These actions, and other similar ones, have been the primary impetus behind the recent trend toward development of skills training courses in the law schools of this country.

The profession must remain diligent in conveying its needs to the law schools. It should be demanding, yet supportive, and work on strengthening the ties between the academic world of the law schools and the practically oriented world of the bench and bar. The profession must take a more active interest in clinical and skills training programs at the law schools, by providing financial assistance and through personal involvement. In the past the practicing bench and bar and the law school community have viewed each other with suspicion. The profession must work to eliminate this suspicion and to achieve a cooperative and positive relationship with the law schools.

The profession also must recognize that the responsibility for ensuring the competency of practicing lawyers does not lie solely with the law schools. Encouraging trends can be seen in this area as well. Bar association-sponsored continuing legal education programs, for example, are becoming commonplace. The Code of Professional Responsibility³⁹ is being enforced with increasing vigor. More can be done, however. One concept with potential is that of local "Peer Review Committees."⁴⁰ These committees would not be disciplinary bodies but, rather, would investigate claims of inadequate representation by counsel and assist the lawyer in solving any identified deficiencies. The profession must be ready to experiment with this and other imaginative proposals to improve the monitoring and performances of its members. The bench and bar are in the same position as the law schools: If they do not effectively police themselves they can be certain that eventually someone else will do it.

V. CONCLUSION

The legal profession is in a period of flux and introspection. It is also a period of opportunity and potential. At the present time it is both feasible and necessary for the law schools and the bench and bar to work in a spirit of cooperation toward the goal of providing quality legal services to the public. To accomplish this the law schools must fully realize that their job includes training lawyers in the difficult skills of counseling, negotiating, writing, and trial and appellate advocacy. The profession must realize that it has a duty to demand this of the law schools, to assist the law schools in meeting their responsibilities, and to provide meaningful skills training programs for practicing lawyers to supplement law school training.

³⁹ A.B.A., CODE OF PROFESSIONAL RESPONSIBILITY (1978).

⁴⁰ See FINAL REPORT, *supra* note 1, at 15-17.